In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-951

DAVID BOHN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the trial court erred in denying them an evidentiary hearing to determine whether the government's application for court-ordered electronic surveillance was properly authorized in accordance with the provisions of 18 U.S.C. 2516(1), and that the evidence failed to establish the commission of an offense cognizable under 18 U.S.C. 1955.

Following a non-jury trial in the United States District Court for the District of Minnesota, petitioners were convicted of engaging in an illegal gambling business in violation of 18 U.S.C. 1955 (count 2), and of conspiracy to commit that offense in violation of 18 U.S.C. 371 (count 1) (Pet. 4; Pet. App. A2).[1] Petitioners

[1]Also named in same counts of the indictment were Joseph Sierbinski, Dick Randazza, Neil Thomas Naftalin, Peter Cohen, John Ruberto, Vivian E. Ruberto, and Evelyn D. Kleve. The government agreed to dismiss the charges against Cohen (who died before trial) and Naftalin. The other co-defendants were tried with petitioners and convicted on both counts. Co-defendants John Ruberto, Vivian Ruberto, and Evelyn Kleve, did not appeal their convictions; the conviction of co-defendant Sierbinski was reversed by the court below (Pet. App. A2, A8).

Vernon Kleve and George Patterson were sentenced to concurrent terms of eighteen months' imprisonment on each count; petitioner Bohn was sentenced to concurrent terms of one year's imprisonment on each count; and petitioner Max Weisberg was sentenced to concurrent terms of six months' imprisonment on each count (Pet. App. A2). The court of appeals affirmed (508 F.2d 1145; Pet. App. A1-A8).

The evidence, consisting of petitioners' conversations intercepted pursuant to court-authorized electronic surveillance and of physical evidence of gambling paraphernalia found in petitioners' possession, showed that petitioners Vernon Kleve, Patterson, and Weisberg operated a gambling business and "engaged in every activity common to that occupation" (Pet. App. A5). Petitioner Bohn, who was also engaged in bookmaking activities, exchanged line information and placed layoff bets with the Kleve-Patterson-Weisberg operation (Pet. App. A6). The evidence showed that co-defendant Randazza had a similar relationship with the Kleve-Patterson-Weisberg "book" (Pet. App. A5-A6).[2]

1. Petitioners contend that they were entitled to an evidentiary hearing to challenge matters set out in the Attorney General's affidavit. Petitioners concede, however, that affidavits submitted by the government at trial indicate that the procedures followed by the Department of Justice in authorizing the application for the wire interception in the instant case were the same as those employed in *United States* v. *Chavez,* 416 U.S. 562, 579,

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[2]Petitioners Patterson and Weisberg submitted affidavits at trial in support of petitioner Bohn's motion for a new trial, admitting that they conducted a bookmaking business but asserting that Bohn was a mere customer. Bohn contended at trial and on appeal that his only involvement with the Kleve "book" consisted of placing purely personal bets (Pet. 5-6). Bohn does not contend in his petition for a writ of certiorari, however, that the evidence was insufficient for the court to have found that he was engaged in the business of bookmaking.

in which this Court held that an application that incorrectly stated that approval had been given by a specially designated Assistant Attorney General, when approval had in fact been given by the Attorney General himself, did not warrant suppression of the evidence seized pursuant to the court ordered interception, since it was "clearly established" that the application had been authorized pursuant to 18 U.S.C. 2516(1).[3]

Here, as in *Chavez*, the government "clearly established" that the application for the court ordered wire interception was authorized pursuant to 18 U.S.C. 2516(1), and the district court therefore properly denied petitioners' request for an evidentiary hearing on the matter. See *United States* v. *Doolittle*, 507 F. 2d 1368, 1370-1371 (C.A. 5); *United States* v. *Quintana*, 508 F. 2d 867 (C.A. 7); *United States* v. *Ramsey*, 503 F.2d 524, 526, n. 4 (C.A. 7).[4] The Attorney General submitted an affidavit in the instant case, as he did in *Chavez*, stating that he personally approved the application. Petitioners have asserted no basis for questioning the accuracy of this affidavit other than the irregularities also present in *Chavez*, the credibility of the former Attorney General, and the fact that dates on various documents indicate that the chain of events from the Attorney General's authorization to the issuance of the cour order all occurred during the same day. Same-day communication

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[3]18 U.S.C. 2516(1) limits the authority to approve submission of a wire interception application to the Attorney General or an Assistant Attorney General he specially designates.

[4]*United States* v. *Robinson*, 468 F.2d 189 (C.A. 5), and *United States* v. *Bowdach*, 474 F.2d 812 (C.A. 5), upon which petitioners rely (Pet. 8), are inapposite, since in both of those cases (which antedated *Chavez*) the question of the procedures followed by the Justice Department in authorizing applications for electronic surveillance was raised for the first time in the court of appeals, and the court of appeals accordingly remanded the cases for evidentiary hearings on that matter. The *en banc* opinion of the Fifth Circuit in *Robinson*, remanding the case for an evidentiary hearing is reported at 472 F.2d 973.

does not cast doubt upon the accuracy of the affidavit, however, since such documents are routinely transferred by telephonic means between Washington, D.C. and field attorneys. See *United States* v. *Brick,* 502 F.2d 219, 222, n. 7 (C.A. 8).

2. Petitioners contend that the government failed to prove an offense under 18 U.S.C. 1955 because there was no showing that their gambling business involved five or more persons, as required by 18 U.S.C. 1955(b)(1)(ii). They argue that their individual bookmaking operations did not, despite their exchange of line information and lay-off bets, become fused together into a single "business" within the purview of 18 U.S.C. 1955.

Viewing the evidence in the light most favorable to the government (*Glasser* v. *United States,* 315 U.S. 60), however, the court could have reasonably found that petitioners were all involved in a single, interdependent network comprising one gambling "business" to an extent sufficient to bring them within the purview of 18 U.S.C. 1955. Petitioner Bohn and co-defendant Randazza provided a market in lay-off bets for petitioners Kleve, Patterson, and Weisberg and thereby conducted or financed a part of the Kleve-Patterson-Weisberg operation. Moreover, by exchanging line information, petitioners and their co-defendants contributed to the profitability of the entire gambling network. See *United States* v. *Schaefer,* C.A. 8, No. 73-1506, decided January 3, 1975, slip op. 6-11; *United States* v. *Brick, supra,* 502 F. 2d at 224-225; *United States* v. *DeCesaro,* 502 F.2d 604, 611 (C.A. 7); *United States* v. *McHale,* 495 F.2d 15, 18 (C.A. 7); *United States* v. *Sacco,* 491 F.2d 995, 1003 (C.A. 9) (*en banc*); *United States* v. *Ceraso,* 467 F.2d 653 (C.A. 3).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.